UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

BRIAN DAMMEIER, individually, Plaintiff, v. THE HOME DEPOT U.S.A., INC. and UNIDENTIFIED COMPANY A, Defendants.	CASE NO. 16-5481 RJB ORDER ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

This matter comes before the Court on Defendant Home Depot U.S.A., Inc.'s ("Home Depot") Motion for Summary Judgment. Dkt. 27. The Court has considered the pleadings filed regarding the motion and the remaining record.

On March 11, 2016, Plaintiff filed this case in Pierce County, Washington Superior Court, alleging that he sustained injuries after attempting to retrieve an item off a shelf that was above waist-height at a Tacoma, Washington Home Depot on March 15, 2013. Dkt. 1-1. The Home Depot removed the case based on diversity jurisdiction. Dkt. 1. This case is the second brought by Plaintiff asserting the same claims against Home Depot for this event; the first was

filed on May 1, 2014 ("2014 case"), which Plaintiff voluntarily dismissed after Home Depot filed a motion for summary judgment. *Dammeier v. Home Depot*, Pierce County Superior Court case number 14-2-08344-6. Plaintiff's attorney was permitted to withdraw from this federal case on January 4, 2017. Dkt. 26. The Home Depot filed its current Motion for Summary Judgment on February 7, 2017, and noted it for consideration on March 10, 2017. Dkt. 27. Plaintiff did not timely respond. Due to Plaintiff's *pro se* status, he was given a notification pursuant to *Rand v. Rowland*, 154 F.3d 952 (9th Cir. 1998), and the motion for summary judgment was renoted to March 24, 2017. Dkt. 29. Plaintiff requested (Dkt. 30) and was granted another extension of time to respond (Dkt. 34). The motion is now ripe.

For the reasons provided, the Home Depot's motion (Dkt. 27) should be granted, and the case dismissed with prejudice.

I. FACTS

Around March 13, 2013, Plaintiff entered a Home Depot in Tacoma, Washington. Dkt. 1. He states that he attempted to retrieve a box of Beadex All Purpose Joint Compound, which was "stacked real high." Dkt. 28, at 30. Plaintiff testified that as he brought the box down, he "felt a tear" in his shoulder and lost "all use of his arm." Dkt. 28, at 31. The box weighed around 48 pounds. Dkt. 28, at 36 and 59. Plaintiff did not drop the box, however, it bounced off a shelf. Dkt. 28, at 30-31. Plaintiff did not ask for help before the incident. Dkt. 28, at 31. Plaintiff testified that nothing appeared to be wrong with the box, and he did not check the weight, which is on the box, before he attempted to lift the box. Dkt. 28, at 31 and 33.

Plaintiff's Complaint asserts a negligence claim against Home Depot for "creating a dangerous condition that injured the Plaintiff by stocking heavy products above waist level, but within the reach of its customers." Dkt. 1-1. Plaintiff seeks damages. *Id*.

In Home Depot's motion for summary judgment, it argues that there are no issues of fact as to Plaintiff's claim for negligence, and that the case should be dismissed with prejudice. Dkt. 27. Home Depot argues that its decision to stack the boxes of joint compound was not an unreasonably dangerous condition and that Plaintiff cannot show that any alleged breach of a duty of care proximately caused his injuries. *Id.*

Plaintiff responds and argues that "there are many issues of fact that a jury must determine," but does not identify those facts. Dkt. 35. Plaintiff primarily argues that his attorneys should not have been permitted to withdraw from representing him, that he has contacted several attorneys to represent him, and they have all declined to do so. *Id.* Although Plaintiff testified that he did not check the weight on the box, in his response, he now asserts that the weight of the box could not be seen. *Id.* Plaintiff also maintains that he looked for help on the day of the accident, but could not find a sales person. *Id.*

II. DISCUSSION

A. STANDARD ON SUMMARY JUDGMENT

Summary judgment is proper only if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party is entitled to judgment as a matter of law when the nonmoving party fails to make a sufficient showing on an essential element of a claim in the case on which the nonmoving party has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1985). There is no genuine issue of fact for trial where the record, taken as a whole, could not lead a rational trier of fact to find for the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)(nonmoving party must present specific, significant probative evidence, not simply "some

metaphysical doubt."). *See also* Fed. R. Civ. P. 56(e). Conversely, a genuine dispute over a material fact exists if there is sufficient evidence supporting the claimed factual dispute, requiring a judge or jury to resolve the differing versions of the truth. *Anderson v. Liberty Lobby, Inc.*, 477 .S. 242, 253 (1986); *T.W. Elec. Service Inc. v. Pacific Electrical Contractors Association*, 809 F.2d 626, 630 (9th Cir. 1987).

The determination of the existence of a material fact is often a close question. The court must consider the substantive evidentiary burden that the nonmoving party must meet at trial – e.g., a preponderance of the evidence in most civil cases. *Anderson*, 477 U.S. at 254, T.W. *Elect. Service Inc.*, 809 F.2d at 630. The court must resolve any factual issues of controversy in favor of the nonmoving party only when the facts specifically attested by that party contradict facts specifically attested by the moving party. The nonmoving party may not merely state that it will discredit the moving party's evidence at trial, in the hopes that evidence can be developed at trial to support the claim. *T.W. Elect. Service Inc.*, 809 F.2d at 630 (relying on *Anderson, supra*). Conclusory, nonspecific statements in affidavits are not sufficient, and "missing facts" will not be "presumed." *Lujan v. National Wildlife Federation*, 497 U.S. 871, 888-89 (1990).

B. APPLICATION OF WASHINGTON LAW ON NEGLIGENCE

As a federal court sitting in diversity, this court is bound to apply state law. *State Farm Fire and Casualty Co. v. Smith*, 907 F.2d 900, 901 (9th Cir. 1990). In applying Washington law, the Court must apply the law as it believes the Washington Supreme Court would apply it. *Gravquick A/S v. Trimble Navigation Intern. Ltd.*, 323 F.3d 1219, 1222 (9th Cir. 2003). In Washington, a plaintiff making a claim for negligence must show: "(1) the existence of a duty, (2) breach of that duty, (3) resulting injury, and (4) proximate cause." *Mucsi v. Graoch*

Associates Ltd. P'ship No. 12, 144 Wn.2d 847, 854 (2001)(*internal quotations and citations omitted*).

1. Duty

Turning to the first element of whether Home Depot had a duty to Plaintiff, "[t]he common law classification of persons entering upon real property determines the scope of the duty of care owed by the owner or occupier of that property." *Id.*, at 854–55. It is undisputed that Plaintiff was an invitee to Home Depot. So, Home Depot had a duty to Plaintiff to maintain "its store in a reasonably safe condition." *Brant v. Mkt. Basket Stores, Inc*., 72 Wn.2d 446, 451(1967).

2. Breach

In order to show breach of a duty in a premises liability claim, the invitee plaintiff "must establish that the defendant either caused the dangerous condition or knew or should have known of its existence in time to remedy the situation." *Schmidt v. Coogan*, 162 Wn.2d 488, 492 (2007)(*internal citations omitted*).

Plaintiff has failed to show that Home Depot "caused the dangerous condition" or "knew or should have known of its existence in time to remedy the situation," *Schmidt*, at 492, and so has not shown that Home Depot breached its duty. Home Depot points to the testimony of William E. J. Martin, who states that he has experience assessing premises safety for businesses. Dkt. 28, at 47-60. Mr. Martin states that "[u]sing the safe lift calculator developed by the Washington State Department of Labor and Industries, [he] calculated whether removing a box of Beadex All Purpose Joint Compound the sixty inch height shown in [Plaintiff's photographic exhibit of the site with the box on a shelf 60 inches from the floor] would be safe." Dkt. 28, at 59-60. Mr. Martin concluded that the "box of Beadex All Purpose Joint Compound that Mr.

Dammeier removed from the shelf was placed in a safe manner and in conformance with the lifting standards of the State of Washington Department of Labor and Industries." *Id.,* at 60. Aside from asserting that his shoulder was injured when he removed the box from the shelf, Plaintiff makes no showing that Home Depot's stacking of the boxes was not a reasonably safe condition. Plaintiff offers no evidence that a standard of care was violated. The occurrence of an accident is not evidence of negligence. *Marshall v. Bally's Pacwest,* 94 Wn.App. 372, 377 (1999). Plaintiff has failed to show that Home Depot breached its duty to him.

3. Proximate Causation

Further, Plaintiff has not shown that Home Depot's alleged breach proximately caused his injuries. In Washington, "[p]roximate causation has two elements: cause in fact and legal causation." *Schooley v. Pinch's Deli Mkt., Inc*., 134 Wn.2d 468, 474, 951 P.2d 749, 752 (1998). "'Cause in fact' refers to the actual, 'but for,' cause of the injury, i.e., 'but for' the defendant's actions the plaintiff would not be injured." *Id.,* at 478. Legal cause "is grounded in policy determinations as to how far the consequences of a defendant's acts should extend." *Id.*

Plaintiff has not shown that Home Depot's decision to place the joint compound on a shelf was the cause in fact or legal cause of Plaintiff's injury. Plaintiff makes no showing that if the box had been on the floor, for example, and he tried to lift it up to place it in his cart, the result would have been different. Plaintiff does not dispute that the weight of the product was on the box and states that he has no memory of the box being damaged in any way. Plaintiff did not ask an employee for help, even though he was aware that he could have asked for assistance. Plaintiff has not shown that the placement of the boxes was the cause of his injury.

4. Injury and Conclusion

Plaintiff has not offered evidence that he was injured as a result of Home Depot's breach of its duty to him. Home Depot's Motion for Summary Judgment (Dkt. 27) should be granted and Plaintiff's case should be dismissed.

III. ORDER

It is **ORDERED** that:

- The Defendant Home Depot U.S.A., Inc.'s Motion for Summary Judgment (Dkt. 27) **IS GRANTED;** and
- This case **IS DISMISSED**.

The Clerk is directed to send uncertified copies of this Order to all counsel of record and to any party appearing *pro se* at said party's last known address.

Dated this 13th day of April, 2017.

ROBERT J. BRYAN
United States District Judge